SUPREME COURT, U. S.

FILED

MAR 15 1974

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

No. 73-1388

October Term, 1973

MURIEL WATT MEAD, *et al.*,
Petitioners,

vs.

HORVITZ PUBLISHING COMPANY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals of the Ninth Appellate District, Lorain County, Ohio

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Supreme Court of the United States

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MURIEL WATT MEAD, *et al.*,
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vs.

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PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals of the Ninth Appellate District, Lorain County, Ohio

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Appellate District of the State of Ohio entered on June 27, 1973, calling into issue the clarification of (1) the right of a news journalist not to reveal the source of information for a news article and (2) the application of the qualified privilege doctrine to actions for libel and slander against disseminators of the news.

OPINIONS BELOW

The Court of Common Pleas for Lorain County, Ohio, rendered an opinion in favor of the petitioners on December 9, 1971, and subsequently reversed its ruling on September 15, 1972. Thereafter, on June 13, 1973, the Court of Appeals for the Ninth Appellate District of the State of Ohio handed down an opinion adverse to the petitioners and on October 18, 1973, the Supreme Court of the State of Ohio dismissed an appeal from the Court of Appeals. For the convenience of the court, the opinions have been printed in a separately bound appendix hereto.

JURISDICTION

The order of the Supreme Court of Ohio in Case No. 73-722 entitled *Muriel Watt Mead, et al vs. Horvitz Publishing Company, et al.*, dismissing the appeal from the Court of Appeals was made and entered on October 18, 1973. Thereafter, petitioners made application for an order extending time to file petition for writ of certiorari. This request was granted by the Honorable Mr. Justice Potter Stewart extending the time for filing to and including March 16, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Is Ohio Revised Code Section 2739.12 which grants a newspaper reporter the right not to reveal a source of information unconstitutional in so far as it applies to the identity of the informant whose material provided, is itself, the subject of a legal proceeding for conspiracy to libel?

2. Should the rule established in *Rosenbloom v. Metromedia,* 403 U.S. 29, concerning application of the doctrine of qualified privilege to the news media, be broadened so far as to include publication of confidential financial information consisting of a list of creditors' claims on a privately owned business?

3. Whether the application of the doctrine of qualified privilege constitutes a denial of the petitioners' right to privacy under the Fourth Amendment and due process and equal protection of the law under the Fourteenth Amendment to the United States Constitution?

4. If the legal doctrine of qualified privilege does not apply to the respondent's article, does the evidence in this case consisting of the pleadings, interrogatories, depositions and affidavits conclusively establish the existence of genuine material issues of fact at dispute which preclude summary judgment and require this case to be submitted to a jury?

5. Does the granting of a summary judgment without affording the claimant the opportunity to submit opposing briefs, participate in oral hearings, and give access to proper pre-trial discovery constitute a denial of the petitioner's right to due process of law under the Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the Constitution of the United States provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Revised Code, Section 2739.12 reads:

> "Section 2739.12. Newspaper reporters not required to reveal source of information.

No person engaged in the work of, or connected with, or employed by any newspaper or any press association for the purpose of gathering, procuring, compiling, editing, disseminating, or publishing news shall be required to disclose the source of any information procured or obtained by such person in the course of his employment, in any legal proceeding, trial, or investigation before any court, grand jury, petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agent, or before any commission, department, division, or bureau of this state, or before any county or municipal body, officer or committee thereof."

STATEMENT OF THE CASE

During the middle 1960's, petitioner, Mrs. Muriel Watt Mead, formed a private corporation named Washington Square, Incorporated, for the sole purpose of constructing an apartment in Lorain, Ohio, a community of about 80,000 people in close proximity to the City of Cleveland. The transaction was effected by Mrs. Mead transferring certain real estate owned by her to Washington Square in return for 380 shares and controlling interest in this company.

Mrs. Mead engaged the services of a local accounting firm, the respondent, Frank, Seringer & Chaney, to oversee both her personal and business financial affairs, including those of Washington Square. Unknown to her, this firm also represented many sub-contractors to whom Washington Square owed sums of money.

As time passed, working capital became a serious problem to the construction project. Thus, in the summer of 1966, a meeting was called to discuss finances. At that meeting, respondent accountant, Frank, convinced Mrs. Mead to personally contribute Ninety-Six Thousand

Dollars ($96,000.00) of her own money as well as assign creditors' claims over to himself and co-conspirator respondent, attorney Warhola, who were to work together and straighten out the financial difficulty of the company. Unknown to the petitioner, both Frank and Warhola were associated with certain other entities which were to later acquire the apartment project at a bargain price in foreclosure.

A few days later, at approximately the time of completion of the project, respondents met and devised a scheme to publish a phony listing of creditors' claims in the Lorain County Journal, a newspaper of general circulation, owned and operated by respondent, Horvitz Publishing Company. The article as it appeared, claimed to be an accurate statement of accounts Washington Square owed to some 43 creditors. In truth, it contained a grossly inaccurate and exaggerated picture of insolvency, wherein 18 of the creditors' accounts were false creating a total overstatement of $178,263.18.

As a result, company creditors made a premature run on the company for payments forcing it into total ruin. Then furthering the conspiracy, respondents were able to get other lending institutions to withdraw and cancel various financial arrangements relating to the construction project, wherein most remaining creditors demanded immediate payment before construction could be completed, and Washington Square was forced to sell out to the conspirators.

Throughout this period, the petitioner, Muriel Watt Mead, was forced to invest considerable sums of her own personal money in an attempt to first implement then salvage the project. As the need increased, she completely lost her other business operations unassociated with Washington Square, as well as suffered total loss of her personal

reputation. In addition, during the years 1966 and 1967 Mrs. Mead, an already aging woman, faced threats, intimidating remarks, anonymous phone calls, and constant harassment from respondents which eventually caused her to suffer a nervous breakdown and necessitated permanent relocation in California.

Thereafter, the petitioners, Washington Square, Incorporated, and Muriel Watt Mead, filed a Complaint in Lorain County Common Pleas Court alleging a conspiracy to libel by nineteen Lorain area defendants made up of respondent attorney, accountant, bank, sub-contractors, newspaper and its agents. Voluminous exchange of interrogatories transpired. Numerous attempts were made by respondent to block pre-trial discovery most importantly of which concerned the overruling of a motion filed by petitioners requesting the identity of the informant who supplied the newspaper with the list of creditors on the basis of Ohio statutory law.

Subsequently, in July of 1971, a Motion for Summary Judgment was filed on behalf of four defendants, all of whom were connected with the newspaper that printed the libelous material. Their motion contained only affidavits and a bare assertion there were no genuine issues of fact. Plaintiffs submitted a Memorandum in September of 1971. The defendants filed a Supplemental Brief reiterating an absence of disputed issues, and for the first time claimed that the false publication of creditors' claims out of which this suit arose was a qualifiedly privileged article falling within the concept of protected material under the First Amendment of our Federal Constitution and the landmark decision of *New York Times v. Sullivan*, 376 U.S. 254. After reviewing the Memorandums, the Record, and applicable authorities, Judge Henderson denied summary judgment in December, disagreeing with

respondents saying there were definitely genuine issues of material fact which needed to be submitted to a jury.

Six (6) months later, once trial had already been set, the same newspaper defendants filed a Motion to Reconsider Summary Judgment. On September 14, 1972, the trial court ruled that under the Supreme Court guidelines set forth in *Rosenbloom v. Metromedia*, 403 U.S. 29, the doctrine of qualified privilege applied to the case at bar. Consequently, it no longer made any difference if the petitioners proved the article in question to be untrue or that the newspaper agents failed to verify the accuracy of their story.

In addition, the court further reasoned if the article itself could not be libelous then it follows that there can be no action for conspiracy to libel. Thus, the trial court notified all counsel by a letter that it would similarly sustain motions for summary judgment with regard to all other defendants, as each was filed. All remaining defendants followed this directive and the Court granted each party a summary judgment without giving plaintiffs an opportunity for opposition either by way of memorandum or hearing.

From these rulings granting summary judgment and the complete disregard for procedural prerequisites exercised by the trial judge, the petitioners appealed to the Court of Appeals, Ninth Judicial District, Lorain County, Ohio. In June of 1973, The Honorable Judge Victor handed down an opinion affirming the position of the trial court. Petitioners renewed their claim in a Memorandum in Support of Jurisdiction filed with the Supreme Court of Ohio, however, were defeated on the ground that they presented no constitutional questions.

REASONS FOR GRANTING THE WRIT

Argument I—Unconstitutional and Conflicting Statute

At common law, communications made to journalists did not enjoy any privilege against later use as evidence in a legal proceeding. Consequently, newspapers could always be compelled to reveal information given to them in their professional capacity, as well as the identity of the individual from whom that information eminated. (See 7 A.L.R. 3rd 592.)

For years, news gathering and disseminating organizations have bitterly argued that such evidence must be prohibited in order to encourage freedom of speech as provided in the First Amendment. Yet from the very beginning of our nation until 1958, no such suggestion was legally asserted and our news media got along quite well gathering news without it.

But then many states including Ohio, subsequently enacted statutes in agreement with the press which were designed to shelter such information. Most particularly in 1953, the Ohio State Legislation enacted Ohio Revised Code Section 2739.12 granting a newspaper reporter the right not to reveal the identity of a source of information in a news article. The statute remains on the books as all encompassing, including those times a newspaper reporter becomes involved in a legal proceeding.

As pointed out, the statute being in derrogation of common law must be narrowly construed. Thus, much sister state case law has arisen providing a basis for areas where it has been held unanimously that the privilege may be waived. (See 9 CLEVELAND MARSHALL LAW REVIEW 2d, 314, OHIO STATE LAW JOURNAL No. 2, 382) whenever (1) the inquiry relates to the 'means' of acquiring the information; *State v. Donovan*, 30 Atl. 2d 421 (N.J.); or (2) where the defendant relies upon the defense of truth; *Bro-*

gan v. Passaic Daily News, 122 Atl. 2d 473 (N.J.); (See also: *Cepeda v. Cohane*, 233 Fed. Supp. 465 (N.Y.); also, *In Re: Taylor*, 193 Atl. 2d 181 (Pa.).) But most importantly, the very constitutionality of this statute now appears in doubt. For on June 29, 1972, this Court handed down a historical ruling contained in *Branzburg v. Hayes*, 408 U.S. 665, saying that a newspaper could no longer use the First and Fifth Amendments as an excuse for concealing its source of information when brought before many types of legal proceedings.

In the present case, the Lorain Journal and its agents have refused to identify the person or persons from whom the contents of the libelous article were received. This information is at the very crux of a law suit for conspiracy to libel in which the newspaper itself is named as a litigant. Repeated attempts by way of interrogatories, depositions and motions to compel the revealing of the identity of the person who supplied the creditors' list have been denied by the Court. Similarly, the plaintiffs have been unable to obtain any information posed about persons associated with the publication itself, or those who possessed knowledge about compiling, editing,and the planning behind the article.

The case now before this most Honorable Court contains allegations centered around a conspiracy to publish libelous material. Paramount among items for discovery lies the identity of the person or persons who supplied the Lorain Journal with the so-called list of creditors and amounts owed by plaintiff-appellant, Washington Square, Incorporated.

Throughout the course of this litigation, the five appellees associated with the Lorain Journal have done everything within their power to impede discovery surrounding the actual publication of the libelous article in

question, and with the prejudicial rulings of the Common Pleas Court supported by Ohio Revised Code Section 2739.12 and upheld by the Court of Appeals, it has been totally impossible to get at vital information concerning this particular phase of the conspiracy.

In the first place, petitioners feel that Ohio Revised Code 2739.12 never was designed to protect respondents as to the physical means of gathering or validating the information published. In the second place, as for the narrower question concerning identity of source, the petitioners argue that the respondents at the very least waived said privilege whenever they introduced the affirmative defense of truth, but even more importantly in light of *Branzburg, supra,* that the statute itself is unconstitutional whenever the information sought to be protected is actually the subject of a lawsuit such as here.

The petitioners easily conceive why the respondents possess a preference here for anonymity in order to escape liability in a civil action and avoid possible later criminal prosecution. While understandable, this is hardly an excuse deserving of constitutional protection in a nation of law and order which traditionally has encouraged the revealing of shady wrongdoings.

There is no reason a newspaper or its agents should not be likewise encouraged to open its door for inspection to the same degree as the entities or persons about which it reports. By denying such opportunity in the present case, the courts below have severely hampered progress of discovery and prejudiced petitioners to the point where this ground in and of itself constitutes severe denial of due process.

Argument II—Qualified Privilege

Throughout the framework of defamation law as applied to the news media, there runs a concept commonly called "qualified privilege." This principle is, of course, universally referred to, in legal circles, as "The New York Times Rule." It arose out of the underlying rationale that certain subject matter is by its very nature of such importance that we must do everything to see the material becomes exposed to public limelight even if publication infringes upon the right of an individual's constitutionally guaranteed right of privacy and due process as found under the Fourth and Fourteenth Amendments of our Federal Constitution.

In effect, the rule seriously limits the right of a person in an affected area to have redress in a court of law for libelous matter to which he finds himself victim. Very important factors are changed. The individual plaintiff who attempts to sue a newspaper is held to a higher degree of proof to establish his case. No longer is it enough to show that the libelous article was untrue, or that the newspaper publishers failed to act like responsible professional journalists, who check into the facts first before they are printed. *Beckley Newspaper v. Hanks*, 389 U.S. 81. No longer is a "preponderance" of the evidence enough to establish a defamation case. Instead, in those areas covered by the privilege, the plaintiff must now prove his case by "clear and convincing" evidence.

The privilege began with the landmark *New York Times v. Sullivan* case, 376 U.S. 254, which held that this qualified protection must be accorded publications concerning "public officials." Over preceding years the concept has gradually been broadened to encompass "public employees." *Rosenblatt v. Baer*, 303 U.S. 75, then "public servants", *Garrison v. Louisiana*, 379 U.S. 77, until now

the paramount consideration is to protect those areas deemed to be of "public interest." *Time, Inc., v. Hill,* 385 U.S. 374.

Most recently, on June 7, 1971, this Court specifically considered in *Rosenbloom v. Metromedia,* 403 U.S. 29, the crucial question of whether or not the New York Times Rule applied to "private individuals" as well as to public officials or public figures. In its decision, the Supreme Court of the United States did recognize a shift toward "public interest" rather than one's "official capacity" as the governing factor. Yet, it did not anywhere proclaim coverage to all private individuals.

In speaking about freedom of expression in the private sector, the Court mentions extended coverage only to:

> "Issues about which information is needed as appropriate to enable the members of society to cope with the exigencies of their period." (*Supra* 41)

or

> "Those areas of economics and social power that virtually affect the nature and quality of life in the nation." (*Supra* 41)

The guideline becomes the importance of the event itself:

> "The conduct of the participant and the content effect and significance of the conduct." (*Supra* 43)

Thus, petitioners believe there must be *considerable* public interest before the New York Times Rule applies to any given situation.

In the case at bar, the Ohio Court of Appeals upheld the lower court ruling saying that the libelous article containing a false list of 43 of Washington Square's creditor claims, falls under the doctrine of qualified privilege. Certainly the present case involves no issue of constitutional magnitude. Mrs. Mead is an elderly lady never in the public limelight. Washington Square was formed solely

to construct and operate one small apartment project of little interest to anyone. It was a privately owned entity. Its financial status could be no more than of passing concern to anyone except the immediate parties to this lawsuit. It had no registered securities on an open market. In the normal course of news reporting, petitioners fail to understand how information pertaining to a company's open credit accounts could hardly be deemed even newsworthy, let alone constitute material of vital public interest. As a matter of fact, the very publication and degree of detailed information printed by the Lorain Journal in this case can but give rise to much suspicion as to their real motive in publishing the list in the paper at all.

Furthermore, in looking at the lower court opinion, along with the ruling in the Ohio Court of Appeals, and past argument posed by respondents quoting the *Rosenbloom* case, one gets the distinct impression that the terminology "public interest" and "newsworthy event" are one and the same. The absurdity of such a statement is obvious. If this were true, then every article ever published in a newspaper or word spoken on radio or television would be covered by the privilege. The result of such reasoning is staggering. For, in effect, we would be giving our news journalists a license to lie!

In the present litigation, this Court has before it a case sounding in conspiracy to libel. The petitioners are a private person and private entity found victim of a horrendous plan for bankruptcy, all for a few individuals' personal monetary greed. The story of the conspiracy itself may now be of public interest. But we are not concerned here with the result of the conspiracy. We are concerned with the question of whether or not the original newspaper article containing a list of 43 accounts payable owed by a privately owned company is subject to privilege.

The respondents feel this is not what this United States Supreme Court held in its very important series of decisions beginning with the *New York Times* case all the way to the most recent *Rosenbloom* ruling. Thus it is, petitioners contend that this wrongful interpretation of the Supreme Court holdings by both the Ohio Courts and by respondents has led to a flagrant violation of a private corporation and a private individual's right to privacy and due process of law.

Argument III—Due Process

In addition to the very important definitive legal areas previously mentioned, the petitioners feel compelled to very briefly point out the effect of the adverse rulings and the blatant disregard for procedural dictates which have resulted in serious encroachment upon the right of due process and equal protection of the law. These issues were extensively discussed at lower judicial proceedings and will be referred to in greater detail in the more comprehensive brief should this Honorable Court grant certiorari.

Suffice it to say here, any party has a basic right to submit opposing briefs and participate in oral hearing whenever faced with an opponent's motion for summary judgment. *Bowdidge v. Lechman*, 252 F.2d 366. *Dredge v. Penny*, 338 F.2d 456. However, in this action, a very strange procedural event took place due to the lower court's interpretation of the aforementioned qualified privilege doctrine.

On June 9, 1972, the sole issue before the court pertained to the legal question of qualified privilege, peculiarly associated to only the five movants and not to any of the other remaining fourteen non-newspaper parties. Petitioners contend the liability of only those five litigants

were before the court. Yet this was not the case, as far as the trial court was concerned. For along with its decision granting summary judgment, a letter accompanied the journal entry; the second paragraph reading as follows:

> "For the further information of plaintiffs' counsel herein, Summary Judgment Motions will be sustained with regard to all other defendants in this particular case once the Motions have been filed." (See Appendix, p. 4.)

Immediately following said invitation, the other respondent filed bare Motions and Journal Entries for Summary Judgment, all of which were granted within days and without according petitioners a right to oral hearing or the filing of depositions of non-newspaper respondents Frank and Warhola. Such action clearly denied them due process of law, especially in light of Ohio law which quite clearly states that a Court has no authority to enter Summary Judgment "sua sponte" without the formality of notice and hearing. *Napier v. Banks*, 38 Ohio Ops. 2d 320.

Furthermore, petitioners can by no stretch of the imagination see how a summary judgment could have been granted in this case. In the first place, removing a type of action such as conspiracy to libel from a jury is impractical because of tortious elements involving subjective feelings which by their very nature should be presented to a jury *Poller v. Columbia Broadcasting System*, 368 U.S. 464. *Hartman v. Time, Inc.*, 69 F. Supp. 376, *Cross v. United States*, 336 F.2d 431, particularly in libelous newspaper publications where the application of the qualified privilege doctrine is itself a jury question. *Goldwater v. Ginzburg*, 261 F. Supp. 784; *Dodd v. Pearson*, 277 F. Supp. 469, *McGovern v. Martz*, 182 F. Supp. 343, or libelous pub-

lications of a company's financial standing such as here. *Atlas Sewing Center, Inc., v. National Association of Industrial Sewing Machine Dealers,* 260 F.2d 803.

Once this Court grants certiorari and the record is transferred to members of this honored bench for review, the legitimacy of petitioners' argument will become obvious. A myriad of genuine issues are disputed and supported in sworn interrogatories, affidavits and depositions offered by both petitioners and respondents to this case. Should the Court affirm the position of petitioners' previous argument on the inappropriate application of the privilege doctrine then truth of the article itself and verification of its accuracy become important determining factors. On these points the petitioners' evidence conclusively proves 18 of the 43 so-called creditors' claims totaling an excess of over $175,000.00 were false and that the article was a reprint of another list introduced earlier at a confidential financial meeting with certain damaging alterations made by the newspaper. Other leading areas of dispute concern a promise by the paper to print a retraction, the dual representation of respondent attorney and accountants, the motive and real purpose of the financial meeting held shortly before the libelous article appeared in the paper and finally the slanderous remarks made personally to Mrs. Mead by various of the respondents.

These are just a few of an inexhaustible number of conflicting areas going to the heart of intent, motive and fraud determinable only by the trier of facts and not to be summarily weighed by the court as occurred in the case at bar. As a result, petitioners have been wrongfully denied their rightful day in court. In so acting, the lower courts have committed serious constitutional error and

denied petitioners due process of law accorded by the Fourteenth Amendment of the United States Constitution.

Respectfully submitted,

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SUPREME COURT, U. S.

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals of the Ninth Appellate District, Lorain County, Ohio

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APPENDIX

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS

(Filed December 9, 1971)

Case No. 71855

COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

MURIEL WATT MEAD *et al.*,
Plaintiffs,

vs.

HORVITZ PUBLISHING CO. *et al.*,
Defendants.

JOURNAL ENTRY

This cause came on to be heard on the Joint Motion for Summary Judgment filed by The Lorain Journal Company, Irving Leibowitz, Jack LaVriha, Jr., and Horvitz Newspaper, Inc. on the 26th day of November, 1971.

This Court, after a careful review of the authority cited and the arguments of counsel, finds that the Motion for Summary Judgment of all movants is not well taken and must be overruled.

The inferences that may be drawn from the facts presented to the Court must be viewed in the light most favorable to the party opposing a Motion for Summary Judgment.

The Court specifically finds that there are in this case genuine issues of material fact which require submission of these issues to the jury. It is the opinion of this Court that a libel action is not appropriately disposed of by summary judgment where the issues of motive, intent, and other subjective feelings are involved, and these issues must be presented to the jury, where the opposing parties would have an opportunity to cross-examine the movants.

IT IS THEREFORE ORDERED and DECREED the Joint Motion for Summary Judgment filed by The Lorain Journal Company, Irving Leibowitz, Jack LaVriha, Jr., and Horvitz Newspaper, Inc. is hereby overruled. Exceptions.

LETTER OPINION OF THE COURT OF COMMON PLEAS

(Dated September 15, 1972)

COURT OF COMMON PLEAS
Ashland County
Ashland, Ohio 44805

September 15, 1972

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212 Ohio Edison Building
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Mr. W. P. Mahle
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Gentlemen:

Re: Muriel Watt Mead, et al vs.
Horvitz Publishing Company, et al
Lorain County Common Pleas Court
Case No. 71855

The Court has finally had the opportunity to put into writing in an opinion and judgment entry the decision of this Court with regard to the motion for reconsideration of the summary judgment motion. After thorough study of Civil Rule 56 and a complete and exhaustive study of the law with regard to conspiracy and actionable libel, it is the decision of the Court that there is no genuine issue as to

any material fact in this case, and that judgment in favor of the defendants should be granted upon the summary judgment motion. Hence, I have today forwarded to the Clerk of the Court of Common Pleas of Lorain County, Ohio the original of the enclosed opinion and judgment entry.

For the further information of plaintiffs' counsel herein, summary judgment motions will be sustained with regard to all other defendants in this particular case once the motions have been filed.

I know that this has been a long and involved case for all parties to this law suit and I noted that this judge sitting in the Common Pleas Court of Lorain County, Ohio was appointed by the Supreme Court almost two years ago to decide this matter. I am surprised that nothing more in the way of depositions or affidavits were filed during that period of time by the plaintiffs insofar as the motion for summary judgment is concerned; however, under Civil Rule 56 this Court now believes that it has no alternative under the state of the evidence which we find in this case but to sustain the motion for summary judgment.

Very truly yours,

/s/ ROBERT E. HENDERSON
Judge

REH:mh

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS

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COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

MURIEL WATT MEAD *et al.*,
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Defendants.

JOURNAL ENTRY

HENDERSON, *J.*

This cause came on to be heard on the motion of defendants, The Lorain Journal Company, Irving Leibowitz, Jack LaVriha, Jr. and Horvitz Newspapers, Inc., for reconsideration of their prior motion for summary judgment. Said defendants have renewed their prior motion for summary judgment and moved for dismissal of the action against them.

The motion is made on the grounds that there is no genuine issue as to any *material* fact and that the moving parties are entitled to judgment as a matter of law as shown by the pleadings consisting of a petition, amended petition, second amended complaint, answer of defendants, affidavits of Jack LaVriha, Jr., Irving Leibowitz, Harry Horvitz, Attorney William G. Wickens, Andrew Warhola, Gladys Kastler and Attorney Walter Mahle.

The second amended complaint filed herein by plaintiff asked for damages in the amount of $1,334,000.00 for alleged libel in an article published in the Lorain Journal on the 19th day of September, 1966, which article set forth a list of creditors and the amounts due them and yet unpaid.

This Court overruled the original motion for summary judgment in order to permit plaintiffs an adequate opportunity to conduct discovery procedures which it now has had an ample opportunity to do. The Court notes that the original petition in this case was filed in this court on September 18, 1967 and that the second amended complaint was filed in this court on October 30, 1970. On the hearing on the motion to reconsider the summary judgment motion held in this court on July 6, 1972, no additional affidavits were filed or presented by the plaintiffs and there is no new evidence presented by way of affidavit or deposition by the plaintiffs to prove a conspiracy on the part of these defendants or that defendants knew of the falsity of the story which was run September 19, 1966, or that defendants recklessly disregarded the truth in publishing said article.

This motion for summary judgment and the motion to reconsider the motion for summary judgment has been filed under Civil Rule 56, which provides in part that upon hearing, a decision is to be rendered upon the evidence and stipulations and affidavits filed, and from such evidence the facts must be conclusive so that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made.

Civil Rule 56 (E) provides in part:

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party

> may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Defendants urge upon the Court the fact that there are two reasons why this summary judgment should be granted and the second amended complaint dismissed—first, there is no proof of a conspiracy among the parties, and, second, that the publication is privileged under the Constitution of the United States. The Court will discuss each reason separately:

1. There is no evidence that the Lorain Journal Company, its editor or reporter have conspired with any other defendant or defendants in this cause for the purpose of destroying the business and the reputation of the plaintiffs. The affidavits on file establish that the list of creditors as prepared by Mr. M. Norman Frank, accountant for the plaintiffs, was not altered by the Lorain Journal Company. Said affidavits further establish that the plaintiff, Muriel Watt Mead, was not known to the publisher, editor or reporter of the Lorain Journal. Said affidavits further establish that the list of creditors was considered to be true by the Journal and that its publication was deemed newsworthy as a matter of public interest. The affidavits further disclose that the publication of the creditors list as prepared by plaintiffs actually was published at a time when said accountant was in charge of Washington Square, Inc., as trustee, and had authority to act for said corporation. Said affidavit further establishes that Muriel Watt Mead and Gladys Kastler and other shareholders had by corporate resolution on August 31, 1966, declared that the corporation was insolvent, unable to pay its debts, and had

ordered as assignment for the benefit of creditors. No claim is made or proof offered of any improper action by the Lorain Journal Company prior to August 31, 1966 when Washington Square, Inc. was already insolvent by statement of its officers and shareholders. There is absolutely no evidence before the Court of any conspiracy connecting the Lorain Journal Company, Horvitz Newspapers, Inc., Irving Leibowitz or Jack LaVriha, Jr. with any unlawful acts committed by any other defendants. In the case of *Minarik vs. Nagy, et al.*, 9 Ohio App. 2d 194, the Court of Appeals for Cuyahoga County in the opinion quoted 10 Ohio Jurisprudence 2d 59 which states:

> ". . . Conspiracy . . . viewed as a tort, is a malicious combination of two or more persons to injure another, in person or property, in a way not competent for one alone, resulting in actual damage to him."
>
> "Conspiracy in and of itself furnishes no cause of civil action. The gist of the civil action for conspiracy is the damage caused by acts committed pursuant to a formed conspiracy, rather than the conspiracy itself; and unless something is actually done by one or more of the conspirators which proximately results in damage, no civil action lies against anyone."

The Court holds in this case that there is no proof of any conspiracy and that there is no evidence of any damage caused by acts committed pursuant to the non-existent conspiracy.

2. Defendants also urged that as a matter of law there is a privilege accorded to the publication in question by virtue of the Constitution of the United States. In the instant case the plaintiffs have submitted no evidence by affidavit or otherwise to counter the affidavit of defendants that publication was made neither with knowledge or its falsity nor in reckless disregard of the truth.

This privilege began with the case of *New York Times vs. Sullivan*, 376 U.S. 254. Here the Court held that a public official suing in libel for a defamatory falsehood cannot recover unless he proves that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false. It is said in the opinion of that case that exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The Court further holds in that case that the risk of exposure is an essential incident where primary value on freedom of speech and of the press is placed. This case was concerned with a public official, however, the Supreme Court of the United States extended the privilege therein announced in the case of *Rosenblatt vs. Baer*, 383 U.S. 75. Here the Supreme Court extended the protection of the rule beyond public officials to public employees holding positions of public interest. In the case of *Garrison vs. Louisiana*, 379 U.S. 64, at 77, the court further extended its rule beyond official conduct to include the free flow of information concerning public servants, holding that anything touching fitness for office is relevant and protected, including private character and improper motivation. This apparently was an indication of what was to follow, that is, public interest was to be deemed paramount and the Constitution would protect all discussions of public matters and public concerns.

In the case of *Time, Inc. v. Hill*, 385 U.S. 374, the Supreme Court extended the above rule further since in this case no public official or public figure was involved. The publication complained of an act of a play alleged to be a reenactment of events in a private home. The Supreme Court found that the report, even if false, was newsworthy and was protected as a free expression in the absence of proof that the publisher knew of the falsity of the report or acted in reckless disregard of said truth. The test now

became whether the report was a matter of public interest. In this regard the Court stated:

> ". . . We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to non defamatory matter. Even negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity. A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.
>
> In this context, sanctions against either innocent or negligent misstatements would present a grave hazard of discouraging the press from exercising the constitutional guarantees. *Those guarantees are not for the benefit of the press so much as for the benefit of all of us.*
>
> A broadly defined freedom of the press assures the maintenance of our political system and an open society. Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to steer . . . wider of the unlawful zone . . .; and thus create the danger that the legitimate utterance will be penalized."

The Court finalized the rule in the case of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29. Here the Court stated that if it would fulfill its historic function, freedom of dis-

cussion must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. In this case, the Court held that the mere claim of falsity or incorrectness is no longer enough to establish a libel. This case goes further and holds that a failure to make prior investigation does not constitute proof sufficient to present a jury question whether the statements were in fact made with reckless disregard or whether they were false or not. In the case of *St. Amant vs. Thompson*, 390 U.S. 727, the Court held that there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication. In the case at bar there is absolutely no evidence that these defendants entertained any doubt as to the truth of the publication.

The best summation of the landmark case in this field of the law is found in *Rosenbloom vs. Metromedia, Inc.*, 403 U.S. 29, where the Court said:

> "We thus hold that a libel action, as here, by a private individual against a licensed radio station for defamatory falsehood in a newscast relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not."

This Court finds that there is not even a preponderance of the evidence in this case in favor of plaintiffs, let alone clear and convincing evidence of the same.

Ohio courts have followed the reasoning of the Supreme Court in the case of *Driscoll vs. Block*, 3 Ohio App. 2d 351, wherein it was held by the Court that such action in libel cannot be maintained unless the article was pub-

lished with actual malice, that is, with knowledge of its falsity or with a reckless disregard of whether or not the facts upon which the publication was based were true or false. In two unreported cases, to-wit: *Campbell vs. Mansfield Journal Company, Inc.*, decided in March of 1972 by the Fifth District Court of Appeals, and *Drye vs. Mansfield Journal Corporation*, decided by the Common Pleas Court of Richland County, Ohio, all of these principles of law as enunciated by the Supreme Court of the United States have been approved and followed in libel actions, and summary judgments have been granted and approved by the Appellate Courts when appealed.

The evidence in this case, which again consists solely in the affidavits which have been filed in connection with the motion for summary judgment, construed most favorably for plaintiff fails to show that a cause of action exists for plaintiffs against the defendants herein. Obviously, the reckless disregard standard now in force may permit recovery in fewer cases than would a rule that publishers must set the standard of a reasonable man or a prudent publisher. Obviously, every standard or rule that can be devised in this area would have some weakness. However, considering the benefit and the welfare of the public, the present rule seems to carry the greater logic for its existence as has been set out in the case of *St. Amant vs. Thompson*, 390 U.S. 727.

For all of the above reasons stated herein and applying the reasoning of the Fifth District Court of Appeals in its case of *Campbell vs. Mansfield Journal Company, Inc.*, the Court finds that the motion for summary judgment and the motion for reconsideration of the same is well taken, and that the plaintiffs have failed under Civil Rule No. 56 to present sufficient evidence, either by deposition or by affidavit, to prove to the Court that they have a cause of action against the defendants herein.

Defendants' motion for reconsideration of summary judgment is sustained and the motion for summary judgment is granted on the grounds that there is no genuine issue as to any material fact and the moving parties herein are entitled to judgment as a matter of law.

Costs taxed to the plaintiff. Exceptions noted.

ROBERT E. HENDERSON
Common Pleas Judge

OPINION OF THE COURT OF APPEALS

(Decided June 13, 1973)

Case No. 2083

COURT OF APPEALS
NINTH JUDICIAL DISTRICT
LORAIN COUNTY, OHIO

MURIEL WATT MEAD *et al.*,
Plaintiffs-Appellants,

vs.

HORVITZ PUBLISHING CO. *et al.*,
Defendants-Appellees.

OPINION

VICTOR, *J.*

This appeal stems from orders of the Court of Common Pleas of Lorain County, wherein that court granted summary judgments, each in favor of certain defendants (appellees).

This action was originally commenced on September 19, 1967. In essence, the complaint alleged a conspiracy by all defendants to libel the plaintiffs. On October 30, 1970, a second amended complaint was filed, to which answers were duly filed, joining the issues. The allegations of this second amended complaint are essentially the same as the original, namely, a conspiracy to libel.

Plaintiff (appellant) Muriel Watt Mead, a real estate developer, was the owner of certain real property in the

city of Lorain, Ohio, which she transferred to plaintiff (appellant) Washington Square Apartments, Inc. They proposed to develop a modern apartment complex on the transferred property. The multiple defendants are individuals, and companies, in the Lorain area, engaged in various pursuits which have been categorized as follows: (1) accounting, (2) legal, (3) financial, (4) publishing, and (5) construction.

The plaintiffs declare that the defendants conspired together to destroy their business and reputation, and to impugn their financial stability and business judgment; that defendants caused to be published, in the Lorain Journal, a false list of plaintiffs' creditors; that the Lorain Journal, and its editor and reporter, knew or should have known (had they investigated), that the list was false, and that the implication to be drawn from the publication was that the plaintiffs were insolvent.

Plaintiffs further allege that, as a result of this publication, their business reputations were ruined, and their assets were eliminated. Their suit was for money damages.

On July 8, 1971, the defendant, The Lorain Journal Company, and its agents, moved for summary judgment. In support of the motion, affidavits were submitted by Lorain Journal personnel (all defendants), stating they believed that: (1) the defendant Frank, who furnished the list of creditors, was a reputable accountant and had authority to prepare and circulate the list of creditors; (2) the list of creditors was a true list; (3) the list of creditors was published exactly as received; (4) the matter was one of public interest; (5) after the article was prepared, it was received by the Journal's editor, who believed it to be true and authorized its publication; (6) there was no

conspiracy between the newspaper, and its personnel, or anyone else, to destroy the plaintiffs' business and reputation.

These statements are not contradicted by any counter affidavits filed in the case.

On December 15, 1971, the court overruled the motion, stating, among other things, that "a libel action is not appropriately disposed of by summary judgment where the issues of motive, intent, and other subjective feelings are involved."

On June 9, 1972, the Lorain Journal asked the court to reconsider its previous order relative to the summary judgment, citing the case of *Campbell v. Mansfield Journal Co., Inc.*, decided March 29, 1972, by the Court of Appeals of Tuscarawas County (No. 1063, unreported), which pertains to the law of libel. The court, on July 17, 1972, after stating that: "the parties being in court with their counsel, said motion for reconsideration was orally argued to the court and submitted for decision," took the matter under advisement. On September 19, 1972, the court rendered its decision, in which it overruled its previous order, and granted summary judgment, finding that there was no evidence to prove a conspiracy on the part of the defendants, and no evidence that the defendants knew of the falsity of the published story of September 19, 1966, or that it was published in reckless disregard of the truth.

The trial court then sent letters to all other defendants which stated that, "upon their filing similar motion for summary judgment, the court will sustain said motions and will dismiss the action with regard to said defendants." This was accomplished, and it is from these orders that plaintiffs appeal.

The assigned errors are as follows:

"1. The pleadings, interrogatories, depositions and affidavits conclusively establish the existence of genuine material issues of fact at dispute which preclude summary judgment and require this case to be submitted to a jury.

"2. The lower court's application of the doctrine of privilege to the particular libelous matter which is subject of this complaint constitutes a violation of the plaintiffs' right to privacy as accorded by the fourth amendment to the Constitution of the United States.

"3. The motion for reconsideration submitted by defendants contains no new material upon which the trial court could properly reverse its previous decision.

"4. The lower court's noncompliance with procedural dictates set forth specifically in Ohio Rule 56 amounted to a complete abuse of discretion which clearly denied plaintiffs of due process of law as guaranteed in the Ohio and Federal Constitutions.

"5. The lower court's action in precluding access to proper pre-trial discovery severely prejudiced the rights of the plaintiffs."

We dismiss the appeal as to appellee Katy Capodice for the reason that it was not timely filed.

We overrule each of the assignments of error and affirm the judgment.

Assignment of Error No. 1

We have examined the pleadings, interrogatories, and affidavits submitted, and we conclude that there is no evidence of any conspiracy among the defendants to libel the plaintiffs, and no evidence of any actionable libel.

The appellants contend that summary judgment is not a proper vehicle for use in libel actions, and they have some support for that proposition. However, its use has been sanctioned in the case of *Washington Post Co. v. Keogh* (1966), 365 F. 2d 965 (writ of certiorari denied, 385 U.S. 1011).

In that case, Keogh, a United States Congressman, sued the Washington Post, and its syndicated columnist, Drew Pearson, for libel. The Post had published columns by Pearson in which he had accused Keogh of bribery. The Post was granted summary judgment, based upon affidavits by Post personnel which stated that, before publication, affiants had read the columns and had no reason to believe or evidence causing them to suspect, that the information in the columns was false. These affidavits were unimpeached. However, no investigation was made to check the accuracy of the information.

In that case, the court held that there was no disputed issue as to falsity because the unimpeached affidavits were dispositive of that issue. The court further said that even the seriousness of the charge, and the controversial character and reputation of the columnist, were insufficient to permit the inference, against the newspaper, that the columns were published with a reckless disregard of the truth, even though the newspaper had failed to investigate the accuracy of the charges.

Assignment of Error No. 2

The trial court's ruling that the doctrine of privilege must be accorded to the published matter was proper. The rule in *New York Times Co. v. Sullivan*, 376 U.S. 254, that a public official, who is suing a newspaper for libel for a claimed defamatory falsehood, cannot recover unless he proves that the statement was made with knowledge of

its falsity, or with reckless disregard as to whether it was true or false, has been applied to the private citizen, in the case of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, when the report is of "public or general concern."

The financial condition of companies and individuals engaged in the development of an apartment complex, costing several hundred thousand dollars, and which involves almost a score of local contractors, and their workmen, together with a local financial institution, and others, is certainly a matter of "public or general concern" in the area in which the complex is being erected. (See, also, *Washington Post Co. v. Keogh, supra*).

Assignment of Error No. 3

The appellants assert that "Ohio law is well settled that a court will not reconsider the same controversy on a subsequent occasion." However, if a court is of the opinion that its first conclusion is erroneous, it has the obligation to change that opinion, especially when no further action has been taken in the case. Apparently, the trial court concluded, after a reading of the Campbell case, and a review of the evidence previously submitted in the light of that opinion, that its previous conclusion was erroneous. Since no new trial date had been set, the trial court had control of this judgment, and had the power to change it. The first order was not res judicata.

Assignment of Error No. 4

We do not sanction the method used by the trial Judge, whereby he suggested that if those defendants, other than the newspaper people, filed motions for summary judgment, he would grant them. However, this was not prejudicial. Appellants recognize that if there was no actionable libel, there could be no conspiracy to libel. Summary

Judgment, as to all defendants, was proper under the state of the evidence.

Assignment of Error No. 5

We find no evidence in this record that the trial court precluded plaintiffs' right to pre-trial discovery.

We find no error prejudicial to the rights of the appellants.

Judgments affirmed.

BRENNEMAN, *P.J.*, and MAHONEY, *J.*, concur.

JOURNAL ENTRY OF THE COURT OF APPEALS

(Filed June 27, 1973)

Case No. 2083

COURT OF APPEALS
NINTH JUDICIAL DISTRICT
LORAIN COUNTY, OHIO

MURIEL WATT MEAD *et al.*,
Plaintiffs-Appellants,

vs.

HORVITZ PUBLISHING CO. *et al.*,
Defendants-Appellees.

JOURNAL ENTRY

It appearing to the court that the Motion for summary judgment filed July 8, 1971, in this case, in the Court of Common Pleas of Lorain County, by the Lorain Journal Company, Irving Leibowitz, Jack LaVriha, Jr., and Horvitz Newspapers, Inc., was accompanied by the affidavits of Jack LaVriha, Jr., Irving Leibowitz, Harry Horvitz, Attorney William G. Wickens (with attached exhibits), and Andrew Warhola (with an attached exhibit);

And, it further appearing that affidavits by Gladys Kastler and Attorney W. P. Mahle were filed in the trial court;

And, it further appearing that the original Motion for summary judgment, and said affidavits, are not included in the transcript of the original papers, but that a copy

of the affidavit of Gladys Kastler is appended to the brief of the appellants, and the affidavit of Attorney Mahle is quoted in the brief of the appellees, The Lorain Journal Company, et al.;

And, it further appearing that copies of the other affidavits previously referred to herein (Leibowitz, et al.), have been supplied to this court by the Clerk of Courts of Lorain County, and that Xerox copies of such affidavits were forwarded by this court to counsel for the appellants, for verification as to their accuracy;

It is, therefore, ordered that, pursuant to Appellate Rule 9(E), the omission be corrected, and that the Motion for summary judgment, and the affidavits referred to above (the copies of which we now have), be, and they hereby are made a part of the official transcript.

MYRON T. BRENNEMAN
Presiding Judge

WILLIAM H. VICTOR
Judge

E. J. MAHONEY
Judge

JOURNAL ENTRY OF THE SUPREME COURT OF OHIO

(Entered October 18, 1973)

No. 73-722

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

MURIEL WATT MEAD *et al.*,
Appellants,

vs.

HORVITZ PUBLISHING CO. *et al.*,
Appellees.

APPEAL FROM THE COURT OF APPEALS
FOR LORAIN COUNTY

This cause, here on appeal as of right from the Court of Appeals for Lorain County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Lorain County for entry.